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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1186

MORRIS S. BROMBERG,

Petitioner,

VS.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Order Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting Writ	7
I. The Summary Order of the Seventh Circuit Court, Affirming the Judgment Order of the District Court, Is Contrary to Controlling Decisions of This Court And To The Decisions of Other Circuits	7
II. The Commission Has Violated Its Own Regulations, Which Require That Employment Procedures Be Professionally Developed And Used Without Discrimination On Any Non-Merit Basis	13
III. The Ruling of the District Court, That the Commission Has Been *Given Discretion* To Engage In Discriminatory Classification, Thwarts the Will of the Executive and the Congress, and the Decisions of This Court	18
IV. The District Court's Ruling That Title VII Does Not Apply To the "Type Of Discrimination Alleged" Is Not Only Inconsistent With the Prevailing Authorities, But Ignores the Fact That *Any Type* of Non-Merit Discrimination Is Repugnant To the Equal Protection Requirements Imposed By the Fifth Amendment Due Process Clause	19

POOR COPY

PAGE

Conclusion 24

Appendix:

A. Order of the United States Court of Appeals for the Seventh Circuit, entered December 19, 1975 ..... Ap. A-1

B. Findings of Fact, Conclusions of Law and Judgment Order of the United States District Court, entered March 25, 1975 ..... Ap. B-1

C. Statutes ..... Ap. C-1

D. Executive Order 11478 ..... Ap. D-1

E. Code of Federal Regulations of the United States Civil Service Commission ..... Ap. E-1

F. Exhibit-Commission's Factor Rating Sheet Ap. F-1

G. Exhibit-Enumeration of Applicant Classification By the Commission ..... Ap. G-1

H. Exhibit-Statistical Analysis Of Pass-Fail Data By Federal and Non-Federal Classification, by the Commission ..... Ap. H-1

I. Exhibit-Statistical Analysis of Pass-Fail Data Based on Age, by the Commission ... Ap. I-1

TABLE OF AUTHORITIES

CASES: PAGES

Albemarle v. *Moody*, 95 S. Ct. 2362 (1975) 12, 15, 16

Borough v. *Federal Power Commission*, 494 F. 2d 1104 (D.C. Cir. 1974) 16

Carter v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1974) 22

Castro v. *Beecher*, 459 F. 2d 725 (1st Cir. 1973) 22

Davis v. *Washington*, 512 F. 2d 956 (D.C. Cir. 1975) 8, 9, 10, 12, 21, 24

Davis v. *Washington*, 348 F. Supp. 15 (D.C.D.C. 1974) 8
Douglas v. *Hampton*, 512 F. 2d 976 (D.C. Cir. 1975) 12, 13, 21, 22
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 11, 18, 19, 21, 22
Hackley v. *Roudebush*, 520 F. 2d 108 (D.C. Cir. 1975) 20, 23, 24
Holmes v. *N.Y. City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968) 19
Hornsby v. *Allen*, 326 F. 2d 605 (5th Cir. 1964) 16, 19
Jenkins v. *United Gas Co.*, 400 F. 2d 28 (5th Cir.) ... 23
Johnson v. *Goodyear*, 491 F. 2d 1364 (5th Cir. 1974) .. 12
Morton v. *Ruiz*, 415 U.S. 199 (1974) 16
Motorola v. *McLain*, 484 F. 2d 1339 (7th Cir. 1973) ... 22
Muniz v. *Beto*, 434 F. 2d 697 (5th Cir. 1970) 10, 22
Rowe v. *General Motors*, 457 F. 2d 348 (5th Cir. 1972) 10
Service v. *Dulles*, 354 U.S. 363 (1967) 16
U.S. ex Rel. Accardo v. *Shaughnessy*, 347 U.S. 260 ... 16
U.S. v. *City of Chicago*, 385 F. Supp. 543 (D.C. Ill. 1974) 10
U.S. v. *Nixon*, 418 U.S. 683 (1975) 16
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 16
Walston v. *County School Board*, 492 F. 2d 919 (4th Cir. 1974) 18, 20, 22
Washington v. *Davis*, U.S. Sup. Ct. #74-1472 (Cert. Granted) 7, 24
Weinberger v. *Weisenfeld*, 95 S. Ct. 1225 (1975) 21

POOR COPY

STATUTES

PAGES

Title 5 U.S.C. 1302, 1305, 5105 and 5115.
Title 42 U.S.C. 2000e-16(b) and (e) 14, 20, 21

EXECUTIVE ORDER

Executive Order #11478, secs. 3 and 5 24

REGULATIONS

Code of Federal Regulations, issued by the U.S. Civil Service Commission, Title 5 C.F.R. Part 300 and 300.101, 300.102 (c), 300.103 (b), 300.103 (2)(c) and 930.201 (a) and (b) 13, 14, 15, 16, 21

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, Morris S. Bromberg, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on December 19, 1975.

ORDER BELOW

The Order of the Circuit Court of Appeals for the Seventh Circuit is unreported, pursuant to local Rule 28, and appears in the Appendix hereto, as Appendix A.

The Findings of Fact, Conclusions of Law and the unreported Judgment Order of the District Court, for the Northern District, Eastern Division of Illinois, appears in the Appendix hereto, as Appendix B.

JURISDICTION

The Order of the Court of Appeals for the Seventh Circuit, summarily affirming the Judgment Order of the District Court, was entered on December 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the U.S. Circuit Court of Appeals for the 7th Circuit departed from the established criteria recognized in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, in affirming the District Court's ruling that pass-fail statistics alone were not sufficient to establish a *prima facie* case and to shift the burden of showing job-relatedness upon the U.S. Civil Service Commission?

2. Whether the U.S. Civil Service Commission may violate its own regulations requiring (a) that employment selection procedures be professionally developed and validated and (b) that those standards be applied without discrimination on any non-merit basis?

3. Whether the discriminatory preference found to be practiced by the U.S. Civil Service Commission against non-federal applicants in the selection of administrative law judges denies equal protection?

STATUTES, REGULATIONS AND EXECUTIVE ORDER INVOLVED

The pertinent portions of the statutes which govern the U.S. Civil Service Commission, (Title 5 U.S.C. §§ 1302, 1305, 5105 and 5115 and Title 42 U.S.C. § 2000 (e)-16 (b) and (e); Executive Order #11478, secs. 3 and 5; and the Code of Federal Regulations, issued by the U.S. Civil Service Commission, (Title 5 C.F.R. Part 300 and §§ 300.101, 300.102 (c), 300.103 (b), 300.103 (2)(c) and 930.201 (a) and (b) are set forth in Appendix.

STATEMENT OF THE CASE

Petitioner, Morris S. Bromberg, an assistant Illinois Attorney General, in February 1972, filed his application with the U.S. Civil Service Commission (Commission), to be appointed a Hearing Examiner, later styled Administrative Law Judge (Adm. Law Judge).

In June 1972, he was advised that while he had met the requirements of the position, he failed to receive an assigned score of 80.[1]

An appeal was taken to the Board of Appeals of the Commission, which denied a request for hearing and summarily affirmed the determination of the Commission.

The Amended Complaint challenged the Commission's employment procedures which, it asserted, did not comport with accepted professional standards and that by reason of its failure to establish ascertainable standards which could be uniformly applied, its examiners were permitted to and did assign points, without a point scale being provided, based upon subjective judgment alone, which resulted in discrimination against applicants from non-federal sources and favored those from the federal sector. Petitioner also claimed that there was discrimination against applicants over age 60.

The District Court held a *de novo* hearing during which petitioner presented pass-fail statistics, prepared by the Commission, (Ap. G, H and I) showing a disparate ratio of 2½ times in favor of federal applicants and a disparate ratio of 6 times in favor of those under 60 years of age. An expert witness on petitioner's behalf, testified that he had ex-

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1. No actual test of examination was ever given. The scoring was based entirely upon the replies contained in the responses to the Commission's inquiries.

amined the Commission's procedures for the selection of Adm. Law Judges and that they do not comport with the guidelines established by the American Psychological Association (APA), the recognized authority in employment testing procedures. [2] He also testified that the statistics prepared by the Commission were adequate to justify the presumption of discrimination against non-federal applicants and those over 60 years of age.

Mr. Charles Dullea, the Director of the Adm. Law Judge selection program, testified that he was not familiar with the Commission's guidelines established for federal employment selection nor was he aware of their application to Adm. Law Judge selection.

No witnesses were presented by the Commission to justify the discriminatory pattern evidenced by the statistics nor to rebut the testimony of petitioner's expert witness. In short, no evidence was offered to show that the Commission's procedures for the selection of Adm. Law Judges were job-related.

The District Court substantially adopted the Findings of Fact and Conclusions of Law submitted by the Commission and entered a Judgment Order denying petitioner all the relief sought. (Ap. B).

While concluding that the Commission's policy of denying to a non-federal attorney applicant a grade or rating equal to a federal attorney of equal standing, was error, the District Court ruled that "the Commission has been given discretion in that regard."

The District Court found from the statistics, prepared by the Commission, that out of 771 applicants in 1972, 624 (80%) were from non-federal sources, while 147 (20%)

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2. In *Douglas* v. *Hampton*, 512 F. 2d 976, 984, (n. 59.) (D.C. Cir. 1975), the APA was so designated.

were from the federal system. Only 95 (15.2%) of the non-federal applicants, however, were selected, while 58 (38.4%) of the federal applicants were selected. The ratio of disparity was 2½ (250%) times in favor of federal applicants.

The Trial Court also found from the statistics, that of the federal applicants who qualified, 13 were given an initial rating of "A" (60 points). Not a single one of the non-federal applicants received an initial rating higher than "C" (55 points). (Ap. H)

The Court also found from the statistics that 178 of the applicants were over 60 years old. 593 were under 60. Only 21 (2.7%) of the 178 applicants over 60 were found qualified. 127 (16.4%) of the 593 applicants under 60, were found qualified. The ratio of disparity thus shown was 6 (600%) times in favor of those under 60. At the time of his application, petitioner had just turned 62.

The trial Court found that the Commission had established no set rules to compute scores and that "the standards for scoring are not capable of precise and mathematical precision."

The District Court nevertheless ruled that the pass-fail statistics were *insufficient* to establish a *prima facie* case and to shift the burden to the Commission to justify the discrimination.

From this order an appeal was taken to the Seventh Circuit Court of Appeals. On December 19, 1975, an unpublished, summary order, issued pursuant to local Circuit Rule 28, was entered by the Seventh Circuit Court, affirming the Judgment Order of the District Court. (Ap. A).

It is from the order of December 19, 1975, that this appeal is taken.

REASONS FOR GRANTING THE WRIT

I.

THE SUMMARY ORDER OF THE SEVENTH CIRCUIT COURT, AFFIRMING THE JUDGMENT ORDER OF THE DISTRICT COURT, IS CONTRARY TO CONTROLLING DECISIONS OF THIS COURT AND TO THE DECISIONS OF OTHER CIRCUITS.

On October 6, 1975, this Court granted certiorari in the case of *Washington* v. *Davis*, #74-1492, which case presents substantially the same questions of law as in the case at bar. Both cases turn on whether proof of disproportionate pass-fail statistics alone, establish a *prima facie* case of discrimination and shifts the burden to the prospective employer to justify the discrimination.

In the case at bar, the District Court reviewed statistics, prepared by the U.S. Civil Service Commission (Commission), which revealed that out of 771 applicants for the position of Administrative Law Judge in 1972, 624 (80%) were from non-federal sources, while 147 (20%) were from the federal system. Only 95 (15.2%) out of the 624 non-federal applicants qualified, while 58 (39.4%) of the 147 federal applicants qualified. The ratio of disparity thus shown was 2.6 times (39.4% to 15.2%). (Finding #7 Ap. B4)

The same statistics revealed an even greater disparity in the Commission's preferential treatment given federal applicants. Of the 58 federal applicants who qualified, 13 received an initial rating of ("A") 60 points, while *not* a *single* one of the 95 non-federal applicants who qualified, received such an initial rating. (Finding #7 Ap. B4) The statistics show that the highest rating given a non-federal applicant was a "C" (55 points). (Ap. H)

The District Court concluded that the Commission's policy of giving preferential treatment to federal applicants, was *error*. Said the Court:

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> "It is the opinion of this court that the decision of the Commission that the experience of the plaintiff as an Assistant Attorney General for the State of Illinois should *not* have a grade or rating *equal* to that given a federal attorney of equal standing is *error*." (Emphasis added)

Notwithstanding its Findings as revealed by the statistics, and in evident contradiction of its above stated Conclusion, the Court ruled:

"The evidence presented is not sufficient to establish a *prima facie* case of discrimination."

In *Davis* v. *Washington*, 512 F. 2d 936 (D.C. Cir. 1975) (cert. granted) (supra), an action had been brought in the District Court, claiming that an entrance examination, developed by the *U.S. Civil Service Commission*, discriminated against blacks in violation of the Due Process clause of the Fifth Amendment and federal civil rights laws. [N.B. Petitioner's action was predicated also on a denial of his equal protection rights under the Fifth Amendment.]

Appellants had tendered to the District Court statistical evidence, elicited from the appellees, which purported to show that the test had a disproportionate impact on black applicant (*Davis*, p. 958, supra.)

Appellees, as in the case at bar, disputed "the capability of those statistics to prove a racially disproportionate impact." (*Davis*, p. 959)

The D.C. *District* Court, in *Davis* determined that the plaintiff's claim of discrimination, evidenced *only* by a showing of statistics, that a higher percentage of blacks failed the test than whites, did not constitute "substantial evidence" to support the plaintiffs' claim of discrimination (See *Davis* v. *Washington*, 348 F. *Supp.* 15, 17, 18), and therefore concluded that the test "was non-discriminatory in design and operation and was 'reasonably and directly related to the requirements of the police recruit training program.' " (*Davis*, (supra) 512 F. 2d at p. 958)

The D.C. Court of Appeals *reversed,* holding that precedents establish that a demonstration of a class-based disproportionate impact shown by statistical evidence of "lopsided" pass-fail rates, *alone,* as a matter of law, is sufficient to establish a *prima facie* case of discrimination. (*Davis,* supra, at p. 359, 360)

Said the Court:

> "In the instant case, if appellants' evidence is sufficient to show an exclusionary impact of black *applicants,* and we *hold that it is,* then the Department must shoulder the heavy burden of justifying Test 21 by demonstrating that the results on the test are satisfactorily related to successful performance of the job." (at p. 959)
>
> • • •
>
> "The cases hold, and we agree, that evidence establishing that significantly more blacks than whites fail a . . . [test] . . . is sufficient, as a matter of law, to show the racially disproportionate impact of the examination. The disparity disclosed in this case . . . is larger than differences held sufficiently disproportionate in other cases" (citations, p. 960, n. 22) (emphasis supplied)

The pass-fail statistical evidence in *Davis,* which the Appeals Court ruled *was sufficient* to show a class-based discriminatory impact, is strikingly similar to the statistical evidence which the District Court in the instant case, ruled *insufficient* to establish a *prima facie case.*

In order to make a proper comparison however, between the statistics in *Davis* (at p. 958) and those in the case at bar, we transpose the "fail" figures in *Davis* to "pass" figures. Thus, since 57% of the blacks failed, 43% passed. And since 13% of whites failed, 87% passed. The ratio of disparity thus shown is *2.02* times (87% to 43%) between whites passing and blacks passing.

In the case at bar, the District Court found that the statistical evidence, prepared by the Commission, showed

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that 95 (15.2% out of the 624 non-federal applicants qualified, while 58 (39.4%) of the 147 federal applicants qualified. The ratio of disparity thus shown between federal and non-federal applicants, who qualified, is *2.59* times. (39.4% to 15.2%). (Finding #7, Ap. B4)

In *Davis* the Court added (at p. 960):

> "Indeed, absent evidence revealing some other reason for the *lop-sided* failure rates appearing here, it is difficult to imagine how the disproportionate effect could ever be *better* demonstrated." (emphasis added)

There can be no doubt that the Conclusion of the District Court in the case at bar, affirmed by the 7th Circuit, that the disparity shown by the statistics "are not sufficient to establish a *prima facie* case" is clearly in conflict with the D.C. Circuit Court of Appeals' ruling in *Davis* and as we will show, it is also in conflict with other Circuits, which have sustained the sufficiency of similar pass-fail Statistics to establish a *prima-facie* case.

In *Muniz* v. *Beto*, 434 F. 2d 697 (5th Cir. 1970) the Court found a wide disparity between two groups of persons, and said:

> "These figures do more than speak for themselves—they cry out 'discrimination' with unmistakable clarity." (at p. 702).

In *Rowe* v. *General Motors*, 457 F. 2d 348, 358 et seq. (5th Cir. 1972) the Court ruled:

> "As with *Jacksonville Terminal* supra, figures of this kind, while not necessarily satisfying the whole case, have critical, if not decisive significance—certainly at least in putting on the employer the operational burden of demonstrating why, on acceptable reasons, the apparent disparity is not the real one. See e.g. *Jacksonville Terminal*, supra, 451 F. 2d 450, 458."

In the case of *U.S.* v. *Chicago*, 385 F. Supp. 543, (D.C. N.D. Ill. 1974), cited with approval in *Davis* (supra), the defendants also disputed the *prima facie* consequences of

the statistical showing of disproportionate *passing* and *acceptance* rates. The Court ruled:

> "The foregoing computations, which defendants do not challenge, establish a *prima facie* case of *de facto* discrimination in employment . . . (citations). Defendants dispute the *prima facie* consequences of the statistical showing of disproportionate *passing* and *acceptance* rates. They assert that statistical imbalance alone has never constituted a sufficient showing of denial of *equal protection* of the laws. Yet a review of the authorities previously cited, which in the main take their lead from *Griggs* v. *Duke Power Co.*, 401 U.S. 424, make clear that a showing of imbalance, the likes of which has here been demonstrated, does constitute a *prima facie* case of discrimination in hiring[3] . . ." (at p. 552)

In the case at bar, the District Court ruled:

> "Since no valid figures have been presented, it is *not necessary* for the court to decide whether a *valid reason* exists for the *discrimination* nor to decide whether the *discrimination* is *prohibited* by a federal law or statute." (emphasis added)

In *Griggs*, 401 U.S. at 431, this Court ruled:

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3. The positions taken by the Government, which is a *plaintiff* in the *Chicago* case and the *defendant* in the case at bar is, to say the least, ambivalent. In *Chicago*, it successfully maintained that statistics showing a class-based, pass-fail imbalance, was sufficient to establish a *prima facie* case of discrimination. In the case at bar, the Government disputes the *prima facie* consequences of the Commission's statistics showing an imbalance in pass-fail rates between federal and non-federal applicants. Its ambivalence here is even more pronounced in the face of its admission of discriminatory preference for federal applicants and its total failure to demonstrate that its selection procedures are job related.

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> "If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."

The authorities are uniform in holding that once there has been a showing of discrimination, the burden shifts to the employer, in this case the Commission, to justify the existence of any disparities.

The prevailing rule is succinctly set forth in *Johnson* v. *Goodyear* 491 F. 2d 1364, 1371, n. 17, (5th Cir. 1974):

> "In discrimination cases, the law with respect to the burden of proof is well settled. The plaintiff is required only to make out a *prima facie* case of discrimination at which point the burden shifts to the defendant to justify the existence of any disparities." (Citing *Griggs*, 401 U.S. 432)

This Court in *Albemarle* v. *Moody*, 95 S. Ct. 2362 at p. 2375, quoting from *Griggs*, 401 U.S. 431, ruled:

> "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question". (*Albemarle*, 95 S. Ct. at p. 2375).

In *Davis*, (supra), 512 F. 2d at p. 961, the Court ruled that where there is shown a disproportionate discriminatory impact:

> "There is a *heavy burden* on appellees to prove that the examination bears a demonstrable relationship to successful performance . . . (See citations, p. 959, n. 15). (emphasis added)

To the same effect is *Douglas* v. *Hampton*, 512 F. 2d 976 at p. 981.

The Commission made a weak, albeit futile attempt, to meet this *heavy* burden. In a memorandum filed in support of its motion to dismiss petitioner's action, the Commission asserted:

> "Although page 4 of the Rating Schedule does indicate a Federal agency attorney will be assigned an "A" rating (60 points) . . . and indicates a state agency attorney is presumed to acquire "C" rating (55 points) . . . the *differentiation* has a *rational* basis. The position being applied for is a hearing examiner [now styled Administrative Law Judge] for *federal* administrative work" (emphasis added)

Apart from the fact that the Commission's bold conclusion is contrary to accepted APA standards which require that there be established *empirical* validity at the time a test is initiated, (see *Douglas* v. *Hampton*, 512 F. 2d at p. 986, n. 80) it also fails to meet the requirements of its own regulations, which specify that the demonstration of rational relationship between performance in the position to be filled and the employment practice used, shall include a showing that the employment practice was *professionally* developed. (Title 5 C.F.R. § 300.103 (b) Ap. E2)

Having established the undisputed fact that the Commission assigns a preferential rating to federal applicants over non-federal applicants, based only upon a conclusion which is not supported by evidence of empirical validity, it follows that the Commission's testing procedures are invalid, and leads to the logical conclusion that the Judgment of the District Court, as affirmed by the Seventh Circuit Court of Appeals, is out of harmony with the decisions of this Court and with the Circuit Courts that have followed those decisions.

II.

THE COMMISSION HAS VIOLATED ITS OWN REGULATIONS WHICH REQUIRE THAT EMPLOYMENT PROCEDURES BE PROFESSIONALLY DEVELOPED AND USED WITHOUT DISCRIMINATION ON ANY NON-MERIT BASIS.

Title 5 C.F.R. § 930.201 of the Commission's Regulations (Ap. E3) provide that the rules and regulations applicable

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to positions in the competitive service apply to Administrative Law Judge positions.

The Commission's authority to promulgate regulations is conferred both by Statute (Title 5 U.S.C. §§ 1302, 1305, 5105 and 5115 and Title 42 U.S.C. §2000e-16(b)) and by Executive Order 11478. (See Ap. C and D)

Pursuant to such authority, the Commission established its regulations to govern the employment practices of the Federal Government that "affect the recruitment, measurement, ranking and selection of individuals for initial appointment . . . in the competitive service" (Title 5 C.F.R. § 300.101 Ap. E1)

In its regulations, the Commission provided the following standards:

(1) That in . . . the case of an entry position, the employment practice is required to be *professionally developed* (5 C.F.R. § 300.103(b) Ap. E2)

(2) That the employment practices shall "be developed and used without discrimination because of race, color, . . . or *other non-merit* grounds." (5 C.F.R. § 300.102(c) Ap. E2). (emphasis added)

Not only was there *no* evidence presented by the Commission to show that its employment procedures were *professionally developed*, but to compound the failure to comply with the Commission's own regulations, neither the Director in charge of Administrative Law Judge selection, nor any of his subordinates was shown to have training in the area of psychological testing procedures. The District Court, who as shown later, was not *convinced* that it was necessary that the selection process meet the standards of psychologists, was content to accept the Director's qualifications as an "expert" on the simple basis that:

> "[H]e has worked in the office of Administrative Law Judges since 1967 and was trained by the former director of that office [There was no evidence of the former Director's professional or academic qualifications either]. Since becoming director, Mr. Dullea has trained others under his direction". (Finding No. 16 Ap. B8)

This Finding also totally disregarded Mr. Dullea's candid testimony that he was not familiar with the Commission's regulations (Title C.F.R. Part 300, et seq. Ap. E1) nor of its application to the regulations regarding the selection of Administrative Law Judges (Title 5 C.F.R. § 930.201(a)(b). (Ap. E3)

In its Finding (No. 16) (Ap. B8) the District Court held:

> "... the testimony of an industrial psychologist [petitioner's expert] untrained in the law, [but otherwise found qualified by the Court as an expert], based on limited statistical and factual information, that the selection processs does not meet the standards of the *profession* of *psychology* [American Psychological Association], does not *convince* the court that the selection process fails to meet the standards of the law." (Emphasis and brackets added)

This ruling is diametrically opposite to the ruling of this Court. In *Albemarle Paper Co.* v. *Moody*, 95 S. Ct. 2362, 2378, where this Court enunciated the correct legal principle:

> "These EEOC Guidelines draw upon and make reference to *professional standards* of test validation established by the American Psychological Association [APA]. . . . The message of Guidelines is the same as that of *Griggs*—that discriminatory tests are impermissible unless shown by *professionally accepted methods*, to be . . . relevant to the job or jobs for which candidates are being evaluated." (Emphasis added).

The Commission's regulations, which are similar to EEOC Guidelines, provide:

> "There shall be a *rational relationship* between performance in the position to be filled . . . and the employ-

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> ment practice used. The demonstration of *rational relationship* shall include a showing that the employment practice was *professionally developed.*" (Title 5 C.F.R. § 300.103(b) Ap. E2) (Emphasis added).

Mr. William Karp, the petitioner's expert witness, a long time member of the APA, testified that the Commission's selection and validation procedures did not comport with its own standards, which are based upon the standards of the APA, and are therefore unacceptable by professional standards. He further testified that the statistics prepared by the Commission *were* sufficient to raise the presumption of discrimination.

No expert witness nor *any* evidence was presented by the Commission to challenge the testimony of Mr. Karp.

Although petitioner submitted authorities to the 7th Circuit Court to support his contention that the Commission was obliged by law to follow its own regulations, e.g. *Service* v. *Dulles*, 354 U.S. 363, 388; *U.S. ex Rel. Accardo* v. *Shaughnessy*, 347 U.S. 260, 266, 267; *U.S.* v. *Nixon*, 418 U.S. 683, 696; *Morton* v. *Ruiz*, 415 U.S. 199, 235; *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, et seq. and *Borough* v. *Federal Power Commission*, 494 F. 2d 1104, 1113 (D.C. Cir. 1947), in its order, affirming the District Court's Judgment Order and Conclusions, the 7th Circuit Court ignored this question as well as all of the other issues presented on appeal.

In *Hornsby* v. *Allen*, 326 F. 2d 605, 610 (5th Cir. 1964) the Court expressed the principle of law thus:

> "The public has a right to expect its officers to observe *prescribed standards* and to make adjudications on the basis of merit . . . Absolute and uncontrolled discretion invites abuse . . ." (Emphasis added)

In *Albemarle* v. *Moody, (supra)* 95 S. Ct. 2362, 2371, this court enunciated the oft repeated rule:

> ". . . the Court's discretion . . . hardly means that it is *unfettered by meaningful standards* or shielded from thorough appellate review." (95 S. Ct. at p. 2371) (emphasis added)

Applying this rule to the discretion delegated by Congress to the Commission, the Commission would appear to be in no better position to contend that its discretion is "unfretted by meaningful standards".

After describing the scoring method employed by the Commission, in Findings Nos. 12, 13, and 14, the Court concluded that "the standards for scoring are not capable of precise and mathematical precision" (Finding No. 16 Ap. B7)

The Court further referred to the "factor rating sheet" (shown as Ap. F). As shown in Finding No. 15, as to Groups 1, 2 and 3, on the factor rating sheet, the Comission's Rating Schedule contains "*no* . . . set rules that *can* be used" in scoring. "It requires *instead* . . . an application of the examiner's *judgment.*" (Ap. B7)

What is most incongruous, is, that while the Court found that "the standards for scoring are not capable . . . of mathematical precision", nevertheless the Commission's examiner *did* assign a *precise* score of 76 to petitioner, just four points short of a "passing"-grade of 80.

It is of utmost significance, that the only witness called by the Commission, Mr. John A. Sutro, a highly respected lawyer, who for years served as Chairman of the prestigious Standing Committee on Judicial Selection of the American Bar Association (ABA), testified that his Committee in a rating process similar to that used by the Commission, did *not* assign *point* values or *rating* scales "because that is just an *impossible job*". (Tr. 567-568).

Based on replies obtained, the ABA Committee rated candidates as "not qualified", "qualified", "well qualified" and "exceptionally well qualified", corresponding to the Commission's "less than adequate", "adequate", "better than adequate" and "outstanding".

We draw the attention of this Court to the Commission's rating sheet (Ap. F), that using ABA Committee terminology, reveals that the respondents to the Commission's requests to rate petitioner overwhelmingly rated him as

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"well qualified" or "exceptionally well qualified" in *all* categories.

This alone would appear to justify an order ruling that petitioner was entitled to a passing score as prayed in petitioner's prayer for declaratory relief.

III.

THE RULING OF THE DISTRICT COURT, THAT THE COMMISSION HAS BEEN *GIVEN DISCRETION* TO ENGAGE IN DISCRIMINATORY CLASSIFICATION, THWARTS THE WILL OF THE EXECUTIVE AND THE CONGRESS, AND THE DECISIONS OF THIS COURT.

In its Finding No. 6 the District Court determined that the Commission did exercise a "discriminatory preference" for the federal applicant "group". Nevertheless, the Court concluded:

> "[T]his court cannot find such finding was arbitrary or capricious. The Commission *has been given discretion* in that regard and this court *cannot* declare its actions null and void." (Ap. B4) (emphasis added)

This conclusion is contrary to universally accepted legal principles.

In *Griggs (supra)* 401 U.S. 424, 431 this Court laid down the rule:

> "*Discriminatory preferences* for *any group* is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, *arbitrary* and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or *other* impermissible *classification*" (emphasis supplied)

In *Walston* v. *County School Board*, 492 F. 2d 919 (4th Cir. 1974) the District Court had ruled that while there was a *de-facto* discrimination by the school board, since there was no evidence of racial motivation, it denied the relief sought.

In reversing the Trial Court, the Court of Appeals, speaking through Mr. Justice Tom Clark, sitting by designation, ruled:

> "We recognize that the school boards should and do have wide *discretion* in the performance of the important duties assigned to them. . . . At the same time, the principle of *equal opportunity* is the law of the land and must never be dishonored. . . To this end, boards must make certain that teachers are not the victims of arbitrary, *discriminatory* action . . . in the entry . . . to the profession." (at p. 927) (emphasis added)

In *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968) the Court ruled:

> "It need hardly be said, that the existence of an absolute and uncontrolled *discretion* in an agency of government vested with a vast program . . . would be an intolerable invitation to abuse." (at p. 265) (emphasis added)

In *Hornsby* v. *Allen*, 326 F. 2d 605, 610 (5th Cir. 1964) the Court expressed the principle of law thus:

> "The public has a right to expect its officers to observe *prescribed standards* and to make adjudications on the basis of merit . . . *Absolute* and uncontrolled *discretion* invited abuse. . . ." (emphasis added)

IV.

THE DISTRICT COURT'S RULING THAT TITLE VII DOES NOT APPLY TO THE "TYPE OF DISCRIMINATION ALLEGED" IS NOT ONLY INCONSISTENT WITH THE PREVAILING AUTHORITIES, BUT IGNORES THE FACT THAT *ANY TYPE* OF NON-MERIT DISCRIMINATION IS REPUGNANT TO THE EQUAL PROTECTION REQUIREMENTS IMPOSED BY THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

The District Court cited *Griggs* to support its ruling. *Griggs* furnishes inappropriate support for that ruling. *Griggs* holds:

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> "Discriminatory *preferences* for *any group* . . . is proscribed. What is required by Congress is the removal of barriers . . . which discriminate on the basis of racial or *other* impermissible classification. (*Griggs*, at p. 431)

In the recent case of *Hackley* v. *Roudebush*, 520 F. 2d 108 (D.C. Cir. 1975), Judge Wright in an exhaustive examination of the legislative history and judicial rulings relating to equal employment opportunities, referred to the 1972 Amendments to Title VII, which extended the scope of equal employment opportunities to the federal sector, and ruled: (at p. 136)

> "We take as our starting point the basic purpose of Section 717 [of Title VII]: The rooting out of *every vestige* of employment discrimination within the federal government" (emphasis added).

To the same effect is *Walston* v. *County School Board*, 492 F. 2d 919, 927 (4th Cir. 1974):

> "It is the affirmative duty of the school board to eradicate 'root and branch' any vestige of discrimination".

The Commission contended that "no authority cited by him [petitioner] covers the 'type of discrimination' here alleged". If this be true, a matter of first impression is being here submitted, namely:

> "Is Title VII limited in discrimination cases to the specific areas proscribed, i.e. race, color, religion, sex and national origin?"

We do not believe that Title VII is so limited. It is obvious that both the Commission and the lower Court have ignored the fact that the 1972 Amendment to the Civil Rights Act directed that the:

> "*Commission* shall . . . enforce the provisions of the Statute . . . and shall *issue* such . . . *regulations* . . . as it deems necessary to carry out its responsibilities . . ." [Title 42 U.S.C. 2000e 16(b) (Ap. C3)] and that nothing in this Act shall relieve *any* government agency of its primary responsibility to assure non-discrimination in employment *as required* by the *Constitution* . . ." 2000e16(e) Ap. C4] (Emphasis added).

The regulations promulgated by the Commission, expanded the *types* of discrimination specifically proscribed in Title VII, by adding to the words "race, color, religion, sex or national origin" the words "or other non-merit factor". Title 5 C.F.R. § 300.103(2)(c) (Ap. E3)

The authorities moreover, make it clear that it is unimportant whether the discrimination is violative of Title VII *or* of the Equal Protection requirements of the Fifth Amendment Due Process clause.

In *Douglas* v. *Hampton*, 512 F. 2d 976, 981 (D.C. Cir. 1975) the Court ruled:

> "No court has distinguished the standard mandated by the Fifth and Fourteenth Amendments from that specified by Title VII. . . . The *Griggs* standard is the measure of the rights and liabilities of the parties".

In *Davis* (supra) the Court stated it thusly: (at p. 958, n. 2)

> "Although appellants' complaint did not allege a violation of Title VII . . . decisions applying Title VII furnish additional instruction as to the legal standard governing issues raised in this case. . . . The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII." (citations).

In the recent case of *Weinberger* v. *Wiesenfeld*, 95 S. Ct. 1225, 1228, (1975), the question presented was whether a gender-based distinction violated the Due Process clause of the Fifth Amendment. There this Court ruled:

> "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'. (citations). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as the equal protection claims under the Fourteenth Amendment." (citations).

It is difficult to accept the premise that either the District Court or the Seventh Circuit Court are unaware of the fact

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that the District Court's Conclusions and Judgment Order are in conflict with accepted legal principles relating to Constitutionally protected *equality* under the law, as established by this Court, other Circuits and in fact its own, where another panel of the Seventh Circuit ruled:

> "The time has come to bring an *end* to *job discrimination* once and for all, and to insure to *every* citizen, the opportunity for the decent self respect that accompanies a job commensurate with one's abilities." *Motorola* v. *McLain*, 484 F. 2d 1339 (7th Cir. 1973).

The spirit of *Griggs* appears to have eluded the District Court which perceived that the U.S. Civil Service Commission, the "model" federal agency, was *given discretion* in its *discriminatory preference* for the "group" of federal applicants, and that spirit has likewise eluded the Seventh Circuit, which summarily affirmed the District Court's judgment and consigned this case to an ignominious burial.

With remarkable consistency, the Federal Courts have followed the letter and spirit of *Griggs*. e.g. *Douglas* v. *Hampton* (supra); *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1973); *Walston* v. *County School Board*, 492 F. 2d 919 (4th Cir. 1974) (which ruled: eradicate 'root and branch' any vestige of discrimination"); *Muniz* v. *Beto*, (supra) (5th Cir. 1970) and *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971). Indeed, careful research has failed to reveal *any* Circuit which has given *Griggs* a *limited* application.

We can only suggest that the Seventh Circuit Court, in *summarily* affirming the Judgment Order of the District Court, thus reducing to ignobility the substantial issues presented for review, determined that it was unwilling, in order to give relief to a *single* individual, to invalidate the selection procedures of the prestigious U.S. Civil Service Commission, as they related to the appointment of Administrative Law Judges.

The fact is that petitioner's complaint is not limited to himself alone. The District Court's Finding (No. 7 Ap. B5)

referred to "groups", meaning federal and non-federal classes of applicants. The Commission acknowledged that there existed these two classifications (See Ap. G, H, and I). It was, therefore, as a member of a *group,* that petitioner was discriminated against. As shown by the statistics, non-federal applicants were selected at a rate of 15.2% while federal applicants were selected at the rate of 39.4%. If non-federal applicants had been selected in the same 39.4% ratio as federal, instead of only 95 applicants qualifying, *245* (39.4%) of the 624 *non*-federal candidates who applied, would have been selected.

A ruling by the 5th Circuit in *Jenkins* v. *United Gas Co.,* 400 F. 2d 28, 33, n.10, supports petitioner's contention that in filing his action he was not acting for himself *alone.* Said the Court:

> "Whether in name or not, the suit by an individual is perforce a sort of class action . . .
> "If he obtains an injunction, he does so, not for himself alone but also as a 'private attorney general' vindicating a policy of non-discrimination that Congress considered of the highest priority. *Newman* v. *Piggie Park,* 340 U.S. at 402 (1968) . . .
> "Declaratory relief, such as is sought here, corresponds to injunctive relief when as a practical matter it serves . . . as a basis for later injunctive relief" (*Jenkins,* at p. 34, n.14).

We are painfully aware that we are engaged in a David and Goliath confrontation with the top administrative agency of the Federal government, which exercises total control in the conduct of examinations for federal employment. However, we are not alone in questioning the procedures of the Commission.

In *Hackley* v. *Roudebush* (supra), 520 F. 2d 108 (D.C. Cir. 1975), the Court noted that the Federal government with 2.6 million employees is the largest single employer in the Nation and further observed that in 1972 the Congress

> ". . . finally perceived the injustice and hyprocisy of a system that demanded more from private employers

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> than it was willing to give itself, that sought to establish a regime of *equality* for the private sector . . . while leaving its own home in *disarray, rife with discrimination.*" (*Hackley*, at p. 136).

Moreover, the Court noted that the House Report, after sketching the Government's abysmal record in the area of equal employment opportunities, *laid* much of the *blame* at the doorstep of the *U.S. Civil Service Commission*, which has been charged with ensuring the *Constitutional* rights of applicants for federal positions to be free from discrimination as embodied in Executive Order . . . 11478 . . . and [to be free from] the *entrenched discrimination* in the federal system . . . (*Hackley*, at ps. 124, 125) (Emphasis added).

CONCLUSION

By the great weight of authority recited in *Davis* v. *Washington* (supra), which is now under consideration by this Court (case No. 74-1492), pursuant to certiorari granted to review the questions raised, statistics of disparities shown by pass-fail rates *alone*, are sufficient to establish a *prima facie* case of discrimination.

The evidence of discrimination in the case at bar however, goes beyond the signifiance of a statistical showing of pass-fail rates.

Petitioner has established by the admissions of the Commission that it exercised preferential discrimination in favor of federal applicants. The District Court made a specific ruling that it was *error* for the Commission to deny to a non-federal lawyer a rating equal to that given a federal attorney. The pass-fail statistical evidence of gross disparities here cannot be challenged. They were prepared by the Commission.

The ruling below that the Commission has been *given* discretion to exercise a discriminate preference, is shown by the great weight of authority, as exemplified by this Court and the other Circuits, to be in error.

It follows, therefore, that the Commission had the *heavy* burden to justify its discrimination as being job related. This it did not deign to do.

We respectfully submit that in the case at bar there is also involved the basic question as to whether a Federal Court shall allow the U.S. Civil Service Commission, which is charged by the President and the Congress to provide equality in federal employment, to keep its own house "in disarray, rife with discrimination" by ignoring its own regulations which are designed to insure that employment selection procedures shall be professionally developed and used without discrimination on any non-merit basis.

Wherefore, petitioner prays that a Writ of Certiorari be granted to review the summary order of the Circuit Court of Appeals for the Seventh Circuit and to reserve the Judgment Order of the District Court.

Respectfully submitted,

MORRIS S. BROMBERG,
4300 Marine Drive,
Chicago, Illinois 60613,

Attorney Pro Se.

Petitioner.

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APPENDICES

APPENDIX A

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 28

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted: November 4, 1975; December 19, 1975

Hon. JOHN PAUL STEVENS, Circuit Justice*

Hon. RICHARD T. RIVES, Senior Circuit Judge**

Hon. PHILIP W. TONE, Circuit Judge

MORRIS S. BROMBERG,

Plaintiff-Appellant,

No. 75-1485 vs.

THE CHAIRMAN, MEMBERS and EXECUTIVE DIRECTOR of the UNITED STATES CIVIL SERVICE COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois.
No. 73-C-537
Joseph Sam Perry,
Judge.

ORDER

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* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Judge Richard T. Rives, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

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The plaintiff-appelant, Morris S. Bromberg, Esq., an Assistant Illinois Attorney General, on February 25, 1972, applied to the United States Civil Service Commission for formal qualification to be appointed a Hearing Examiner, a position later styled Administrative Law Judge. Under date of June 12, 1972, the Director of the Civil Service Commission wrote to Mr. Bromberg as follows:

> This is in reference to the application you filed in the Hearing Examiner examination under Announcement No. 318.
>
> The Commission has determined your basic rating in this examination based upon a careful analysis of all the information filed with your application and the responses to our confidential inquiries. The evaluation of your qualifications showed that you met the minimum requirements in the examination. However, the score you attained was not high enough to meet the passing grade of 80 established by the Commission for the GS-15 grade level in the Hearing Examiner examination.
>
> I am sorry that favorable action on your application was not possible.

Mr. Bromberg appealed to the Board of Appeals of the Civil Service Commission which affirmed the Commission's determination on August 21, 1972.

On March 1, 1973, Mr. Bromberg filed his complaint in the United States District Court for the Northern District of Illinois against the Chairman, members and executive director of the United States Civil Service Commission.

On October 26, 1973, with leave of the district court, the plaintiff filed an amended complaint, substantially expanding his jurisdictional averments and his prayer for relief. The defendants answered the amended complaint. At the plaintiff's request, and over the defendants' objec-

tion the district court held that plaintiff was entitled to a trial de novo.

After a full and complete trial, including written briefs and oral arguments, the district court on March 25, 1975, entered its findings of fact, conclusions of law and final judgment.

The district court's final judgment reads as follows:

> This matter coming on to be heard upon complaint of Morris S. Bromberg asking the court to review a finding of the United States Civil Service Commission that plaintiff has not achieved a minimum score of 80 points on his application for Administrative Law Judge, and asking further for the court to declare its judgment that said finding was arbitrary, capricious and discriminatory, and to find that plaintiff had qualified for a minimum score of 80 points, and the court having heard the testimony of witnesses and considered every exhibit entered into evidence and the court having heard the arguments of counsel, and the court having simultaneously herewith entered its findings of fact and conclusions of law herein,
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff has not proved by the greater weight of the evidence that defendants discriminated against plaintiff or acted arbitrarily or capriciously.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Civil Service Commission acted within its delegated authority and discretion in finding plaintiff unqualified for further processing as an applicant for Administrative Law Judge.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered for all defendants and against plaintiff.

The present appeal is prosecuted from that judgment.

JURISDICTION

The defendants denied that the district court had jurisdiction. That part of the district court's conclusions of law dealing with jurisdiction reads as follows:

> 1. Jurisdiction of this court was invoked under provisions of Title 28, U.S.C., Section 1331, 1337, 1343, 1346, 1361, 1391 and 2201, Title 5, U.S.C., Section 552 (a)(3) and 702. In addition, after resting his case in chief, plaintiff was given leave of court, over defendants' objection, to amend his amended complaint by adding an additional jurisdictional base, 42 U.S.C. § 2000e *et seq.*
>
> 2. The complaint, as amended, does not allege any discrimination against plaintiff by the several defendants because of the race, color, religion, sex or national origin of plaintiff.. Consequently, Title VII to the 1964 Civil Rights Act, (42 U.S.C. § 2000e *et seq.*), is not applicable to the instant case. *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971); *Whitfield* v. *Illinois Board of Law Examiners,* 504 F. 2d 474, 476 F. N. 4 (7th Cir. 1974).
>
> 3. In the complaint, as amended, plaintiff alleged that he has suffered a legal wrong because of the arbitrary and capricious action of the several defendants in derogation of the constitutional rights of the plaintiff.
>
> 4. Under the arbitrary and capricious standard [Administrative Procedures Act, 5 U.S.C. § 706(2)(A)], the scope of review is a narrow one. A reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. *Bowman Transportation, Inc.* v.

Arkansas-Best Freight System, Inc., —— U.S. —— 43 L.W. 4091 (12/23/74); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1974).

We infer from the foregoing that the district court was not convinced that jurisdiction could be invoked under any of the cited statutes other than the Administrative Procedure Act and assumed that the Act provided an independent source of jurisdiction. Similarly, we are not persuaded that any of the other cited statutes is applicable to this case. We have also doubted whether the Administrative Procedure Act can serve as an independent source of jurisdiction of the federal district court.[1] The dilemma has now been solved by this Circuit's decision in *Sanders* v. *Weinberger*, 1975, 522 F. 2d 1167, that the Administrative Procedure Act can serve as an independent source of jurisdiction of the federal district court.

We are in substantial agreement with the findings of fact and conclusions of law of the district court. The judgment is therefore affirmed.

AFFIRMED.

---

1. *Compare* Zimmerman v. U.S., 3rd Cir. 1970, 422 F. 2d 326, 330 with Ortego v. Weinberger, 5th Cir. 1975, 516 F. 2d 1005, 1007-1015.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MORRIS S. BROMBERG,

Plaintiff,

v.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Defendants.

No. 73 C 537

FINDINGS OF FACT

This cause comes on upon the amended and supplemental complaint of Morris S. Bromberg from the ruling of the United States Civil Service Commission, wherein it was ruled that plaintiff had not qualified for the position of Hearing Officer, now designated administrative Law Judge. The defendants have answered said amended and supplemental complaint and have moved for this cause to be remanded to the Board of Appeals and Review for a hearing. The defendants deny the jurisdiction of this court to hear this cause and assert that the court only has jurisdiction to remand this cause to said Board of Appeals and Review for administrative review. The court denied said motion for the reason that there has already been a review. On

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August 21, 1972 the Board of Appeals and Review rendered its decision affirming the decision of defendants, leaving the plaintiff no recourse except to file suit in this court, which he did. The court now reaffirms its decision denying the motion to remand made by defendants and finds and concludes that it has jurisdiction of the parties hereto and subject matter herein.

This is an individual action and is not a class suit. In plaintiff's brief, he seeks relief such as might be appropriate in a class action. However, this suit does not purport to be a class action. No class was established and no class allegations are made. No attempt was made to define a class represented by plaintiff, and no effort was made by plaintiff to comply with the Federal Rules of Civil Procedue as set forth in Rule 23 in bringing this cause to trial. Accordingly, the court must consider this cause solely as an individual suit by the plaintiff and not otherwise.

1. In February, 1972, the plaintiff, Morris S. Bromberg, filed with the United States Civil Service Commission an application and supporting memoranda for Administrative Law Judge, a position described in Announcement 318. The United States Civil Service Commission is hereinafter referred to as the Commission.

2. At the time of his application and for 5½ years prior thereto, plaintiff was employed by the Illinois Department of Revenue and assigned to the Office of the Illinois Attorney General as an attorney handling State revenue matters.

3. After a series of informal contacts, both by telephone and letter, between plaintiff and representatives of the Commission, and after Mr. Bromberg submitted additional information to the Commission on two occasions, he was found to have met the basic eligibility requirements of type, level and recency of experience, required by the Commission for the position of Administrative Law Judge.

4. These basic eligibility requirements are listed in the Rating Schedule, pages 1 & 2, and may be summarized as follows:

a. Membership in a State Bar for 7 years immediately prior to filing an application.

b. Qualifying experience of 7 years' length.

c. At least two years of administrative law experience, or two years of preparation and trial of cases in courts of unlimited and original jurisdiction or the preparation and presentation of appeals therefrom.

d. The experience described in Para. c, above, must have been acquired within the 7 years immediately preceding the date of application.

e. The level of qualifying experience must be equivalent to at least one year of experience at a GS-14 level.

Failure to meet one or more of the above qualifications results in an immediate rating of ineligible and no further processing is done. Plaintiff does not challenge these requirements either on their face or as applied to him and, in fact, he did meet the requirements for basic eligibiliity.

5. Plaintiff contends that he was discriminated against as a non-federal applicant because he was assigned 55 out of 60 points on the basic rating for the GS-15 position, and 50 out of 60 points on the basic rating for the GS-16 position. Not all federal applicants for the GS-15 Administrative Law Judge position receive 60 points, but only those who are employed at the GS-15 level when they apply, and meet all other requirements set forth in Para. 4, of these findings.

6. The Commission found that Mr. Bromberg's experience as an Assistant Illinois Attorney General was not equivalent to that of a federal attorney at the level of GS-15.

This finding was based upon the Commission's weighing of the following factors: (1) Mr. Bromberg's salary level at the time of his application, and as reported to the Commission was less than even a GS-14, which is the level necessary for an award of 55 points; (2) Mr. Bromberg's level of experience consisted of practice, for the most part, before the Circuit Court of Cook County (scored at C or 55-point level by the Commission in their rating schedule); (3) the type of cases with which Mr. Bromberg was involved consisted almost exclusively of State revenue matters. Considering all these factors together, the Commission was within its discretion in finding that Mr. Bromberg's duties did not equal the duties of a GS-15 as set forth in 5 U.S.C. § 5104(15) and that Mr. Bromberg's practice was not sufficiently diversified and complex to warrant an award of 60 points. It is the opinion of this court that the decision of the Commission that the experience of the plaintiff as an Assistant Attorney General for the State of Illinois should not have a grade or rating equal to that given to a federal attorney of equal standing is error. However, this court cannot find that such finding was arbitrary or capricious. The Commission has been given discretion in that regard, and this court cannot declare its actions null and void.

7. In support of his claim of discrimination against him as a non-federal applicant, plaintiff presented statistical evidence prepared by him and based upon raw numbers furnished to him prior to trial by the Commission. There is no claim that plaintiff is qualified as an expert either in the preparation or interpretation of statistical evidence. The evidence presented is not sufficient to establish a *prima facie* case of discrimination. The evidence reflects that for 1972, 147 federal applicants and 624 nonfederal applicants filed applications for the position of Administra-

tive Law Judge. Of these groups, 58 federal applicants and 95 nonfederal applicants qualified to be placed upon the register of eligibles, i.e., they achieved a score of 80 or more and satisfied the brief-writing and oral interview requirements. Furthermore, of those who qualified, 13 federal applicants received an initial award of 60 points, and zero nonfederal applicants received an initial award of 60 points. The percentages computed by Mr. Bromberg do not reflect the following information essential for the proof of a *prima facie* case. There is no showing how many applicants, either federal or nonfederal who did not ultimately qualify, received an initial award of 60 points. When the court notes that 89 out of 147 federal applicants and 529 out of 624 nonfederal applicants failed to ultimately qualify, the failure of Mr. Bromberg to include figures on that group of persons receiving 60 points becomes significant. Moreover, plaintiff has failed to show how many applicants, both federal and nonfederal, failed to qualify for reasons which are set forth in Para. 4 of these findings and which are not in issue in this lawsuit. Only when the court has been shown the number of federal and nonfederal applicants for 1972 who have been assigned a basic eligibility rating can a valid comparison be made of federal and nonfederal applicants who qualify to be placed upon the register of eligibles, and the effect, if any, that the initial award of 60 points makes in the final percentages. Since no valid figures have been presented, it is not necessary for the court to decide whether a valid reason exists for the discrimination, nor to decide whether the discrimination is prohibited by a federal law or regulation.

8. After a basic eligibility of 55 out of 60 points was awarded to plaintiff, several confidential questionnaires were sent by the Commission to persons whose names were furnished by him. The recipients of the questionnaires were

asked to rate the applicant in several different categories, "less than adequate", "adequate", "better than adequate", or "outstanding". The categories of traits to be rated are job related. If a recipient of a questionnaire has had no opportunity to observe an applicant with reference to a particular trait, he may so indicate in his response.

9. The recipient of the voucher rates the applicant as described above and returns the voucher to the Commission. When the Commission has received a sufficient number of vouchers to indicate a good cross-section of the legal profession is represented, an attorney-rater assigns points as described in Paras. 12 & 13, below.

10. In the case of the plaintiff, the Commission initially received a return of 12 vouchers capable of being scored. Later four additional vouchers were received and their weight was added to the score previously computed.

11. Plaintiff contends that the rating process by which he received a score of 21 points out of 40 points is arbitrary, capricious and discriminatory. He further contends that said process is unreliable and invalid and without sufficiently definite standards. Said process is described below.

12. Upon receipt of the ratable vouchers, the attorney-rater arranges each voucher so that more important witnesses such as judges and supervisors, with recent and frequent contacts are rated controlling witnesses, while others, such as co-counsel or opposing counsel, with infrequent and remote contacts are rated noncontrolling and given less weight. After arranging the vouchers in this order, the attorney-rater then transposes the replies of each witness upon a factor-rating sheet. Each respondent is designated by a letter, and when for example respondent "A" has rated an applicant better than adequate in a given trait, the letter "A" is placed in a box corresponding to that trait on the factor-rating sheet.

13. When each reply of each respondent has been so transposed on the factor-rating sheet, the attorney-rater computes points as follows: The traits on the questionnaire are grouped for scoring purposes into four separate groups on the factor-rating sheet. Each group in turn has a range of points available for adequate, better than adequate, or outstanding. The range of points diminishes for each of the four groups so that group one has a maximum of 16 points, group two, a maximum of 12 points, group three, a maximum of 8 points, and group four, a maximum of 2 points.

14. By using the above-described scoring method, the Commission computed a score of 21 points for plaintiff which, when added to his prior 55 points, gave him a total of 76 points. The Commission had set a passing score as 80, a figure designed to obtain a sufficient number of persons eligible to be appointed Administrative Law Judges. Accordingly, plaintiff was assigned an ineligible rating and was not processed further.

15. The standards for scoring applicants for Administrative Law Judges are contained within Supplement 4 to the Rating Schedule. As to Group 4, the standards for assigning points are precise and exact and require no further comment. As to Groups 1, 2 & 3, Supplement 4 reads, in part:

> "There are no magic formulae or set rules that can be used in performing this task, [i.e., computing scores]. It requires instead, a weighing of the relative values of witnesses' testimony and an application of the examiner's judgment."

16. The standards for scoring are not capable of precise and methematical precision. However, Supplement 4 to the rating schedule, including that portion quoted in Para.

15, together with the factor-rating sheet which designates the range of points available by group, and by level, i.e., better than adequate, outstanding, constitutes sufficient standards for the court to decide whether the assignment of points in a given case was arbitrary, capricious, discriminatory and unreasonable. It is further noted that Charles Dullea has worked in the Office of Administrative Law Judges since 1967 and was trained by the former director of that office. Since becoming director, Mr. Dullea in turn has trained others under his direction and control. The testimony of an industrial psychologist, untrained in the law, based on limited statistical and factual information, that the selection process does not meet the standards of the profession of psychology, does not convince the court that the selection process fails to meet the standards of the law. The question of whether a better selection process could be conceived is not before the court. The court finds only that the United States Civil Service Commission is within the power delegated to it by Congress in utilizing the present system.

17. Plaintiff has also alleged that he was the victim of age discrimination. At the time of his application, plaintiff was 62 years old. His name and date of birth were placed by the Commission on his factor-rating sheet and other documents used in evaluating his application. This is of no significance. Witness Dullea testified that an applicant's date of birth is placed on the forms because the form contains a place for this information. Plaintiff himself placed his date of birth not only on his formal application, but also on his supplemental material submitted at the same time as his application. Successful applicants may be certified to an agency for permanent appointment up to age 70.

18. In support of his claim of age discrimination, plaintiff presented statistical evidence similar to that described in Para. 7, i.e., the percentage figures were based upon raw figures supplied to Mr. Bromberg by the Commission prior to trial. The computations were performed by Mr. Bromberg himself. Like the statistics on federal and nonfederal applicants, this evidence is of little, if any, value and is not sufficient to establish a *prima facie* case of age discrimination. The evidence reflects that in the year of 1972, there were 178 applicants out of 771 who were over 60 years at time of application. There were 593 applicants under age 60 at time of application. The evidence further reflects that 21 out of 178 applicants over 60 were found to be qualified and 132 out of 593 under 60 were found to be qualified. The computations presented to the court by Mr. Bromberg are based upon the ages of federal and nonfederal applicants, a division which is not helpful on this issue. Mr. Bromberg has not computed percentages reflecting the ratios of those over 60 who qualified to those over 60 who applied, and of those under 60 who qualified to those under 60 who applied. Of greater import is plaintiff's failure to show how many applicants over age 60 and under age 60 failed to qualify for the reasons listed in Para. 4, and which have not been challenged in the present case. Only upon a showing of the number of persons under age 60 and over age 60 who have been assigned a basic eligibility rating can the proper ratios be formulated and conclusions drawn. Since there has been no *prima facie* case of age discrimination presented, it is not necessary to decide whether a valid reason exists for the discrepancy, nor to decide whether the discrimination is prohibited by a federal law or regulation.

19. In conclusion, plaintiff alleges that the Commission failed to score 4 letters sent or caused to be sent to the Commission by Mr. Bromberg around the time of his in-

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itial application. The letters in question were sent in by Judges Frank McGarr, George Leighton and Raymond Sarnow, and by Mr. George Mahin. Judge McGarr and Sarnow were sent confidential questionnaires by the Commission and, if returned by them, their responses would have been scored on the factor-rating sheet, thereby making the letters moot.

20. Announcement 318 is silent on whether an applicant should send in letters of testimonial with his application. The rating schedule, Supp. 4, reads in pertinent part:

> "If a witness does not execute his inquiry, but does send in a statement either on the inquiry or in a letter, . . . characterize his comments in the column headed 'Basic Rating' on back of Form E-357. In the foregoing manner, profile every inquiry."

The foregoing statement relates only to letters sent in response to confidential questionnaires and not to letters solicited by the applicant. The Commission has a policy assigning little weight to these types of letters.

21. There was no duty on the Commission to send a confidential questionnaire to every person suggested by an applicant. The Commission attempts to get a cross-section of the legal community who are aware of an applicant's qualifications.

22. The letter of George Mahin was written by Frank Fiorite, a supervisor of plaintiff's at the Department of Revenue. George Mahin signed the letter and could thereby be said to have adopted its contents. On his application, plaintiff listed his supervisors as Calvin Campbell and Wm. Scott and it appears from the administrative record that they were sent confidential questionnaires. This is sufficient representation of plaintiff's supervisors.

23. The letter of Judge Leighton was written by him and based mainly upon his recollection of plaintiff in a single case. The administrative record reflects that several judges returned confidential questionnaires rating Mr. Bromberg and this also is a sufficient cross-section of judges.

24. It has not been shown that even if the letters mentioned in Paras. 22 & 23 had been formally rated, it would have made any difference in plaintiff's final score and in that sense they are moot. Witness Dullea testified that he reviewed these letters and found that, in fact, they did not change plaintiff's final score.

J. S. PERRY,

Judge.

DATED: March 25, 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MORRIS S. BROMBERG,

Plaintiff,

vs.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Defendants.

No. 73 C 537

CONCLUSIONS OF LAW

1. Jurisdiction of this court was invoked under provisions of Title 28, U.S.C., Section 1331, 1337, 1343, 1346, 1361, 1391 and 2201, Title 5, U.S.C., Section 552(a)(3) and 702. In addition, after resting his case in chief, plaintiff was given leave of court, over defendants' objection, to amend his amended complaint by adding an additional jurisdictional base, 42 U.S.C. § 2000e *et seq.*

2. The complaint, as amended, does not allege any discrimination against plaintiff by the several defendants because of the race, color, religion, sex or national origin of plaintiff. Consequently, Title VII to the 1964 Civil Rights Act, (42 U.S.C. § 2000e *et seq.*), is not applicable to the instant case. *Griggs* v. *Duke Powers Company,* 401 U.S. 424 (1971); *Whitfield* v. *Illinois Board of Law Examiners,* 504 F. 2d 474, 476 F. N. 4 (7th Cir. 1974).

3. In the complaint, as amended, plaintiff alleges that he has suffered a legal wrong because of the arbitrary and capricious action of the several defendants in derogation of the constitutional rights of the plaintiff.

4. Under the arbitrary and capricious standard [Administrative Procedures Act, 5 U.S.C. § 706(2)(A)], the scope of review is a narrow one. A reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, —— U.S. —— 43 L.W. 4091 (12/23/74); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1974).

5. The Congress has delegated to the U.S. Civil Service Commission the responsibility for prescribing regulations for the admission of persons into the Civil Service. 5 U.S.C. § 3301. The Commission has prescribed regulations for the selection of Administrative Law Judges. 5 C.F.R. 930, 301 *et seq.* There has been no claim presented to the court that plaintiff has been treated by the Commission any differently than other applicants similarly situated. The findings of an administrative agency possessing great expertise in personnel recruitment and charged with the responsibility for selecting applicants of the highest qualifications for Administrative Law Judges is entitled to great deference by the courts. Cf. *Kein River Co.* v. *U.S.*, 257 U.S. 147, 153-154 (1921).

6. Plaintiff contends that the selection process for Administrative Law Judges by which he received 76 points, 4 short of the passing score of 80, is invalid as applied to

him. However, it is well settled that the question of whether a classification passes constitutional muster [or judicial review] cannot be answered simply by assessing its chance effect upon a particular individual, and since plaintiff's attack on the U.S. Civil Service Commission's selection process for administrative Law Judges is based solely upon such a chance effect, it is plainly insubstantial. *Whitfield* v. *Ill. Board of Law Examiners*, 504 F. 2d 474, 476 (7th Cir. 1974).

7. It is well established that educational requirements and proficiency tests are acceptable means of assuring that applicants meet minimum standards of competency. See, *Rasulis* v. *Weinberger*, 502 F. 2d 1006, 1010 (7th Cir. 1974); *Whitfield* v. *Illinois Board of Law Examiners*, 504 F. 2d 474, 477 F.N. 5 (7th Cir. 1974). The selection procedures at issue in this case require a review and evaluation of the practical training, proficiency in writing, character fitness, analytical ability, intellectual capacity, and breadth of experience of the applicant. These qualities have a rational connection to the applicant's fitness or capacity to function as an Administrative Law Judge, a position which is judicial in terms of its duty, responsibility, and procedural requirements.

8. Plaintiff has introduced into evidence certain statistics which he concedes are not conclusive on the issue of discrimination against him because of age and his non-federal employment. Plaintiff does contend, however, that said statistics are sufficient to establish a *prima facie* case, which would shift the burden of going forward with the evidence to defendants, to either explain or to disprove the statistical evidence. For the reasons stated in the Findings of Fact, the statistics presented by plaintiff herein are not

sufficient to establish a *prima facie* case of age or employment discrimination. See *James* v. *Wallace*, 43 L.W. 2271 (U.S.D.C. M. Ala., Dec. 12, 1974) for an analysis of statistical evidence, similar to that produced in the instant case, which did take into account all relevant factors, and which was described by the court as falling "far short of the proof required to demonstrate abuse of a statutory discretion." Cf. *Carter* v. *Jury Commission of Green County*, 396 U.S. 320 1969. It is also noted that the certificate of eligibles for Administrative Law Judge both as of 1972 and the current list reflect a majority of applicants from nonfederal positions and a significant number of applicants over age 60. Cf. *Chance* v. *Board of Examiners*, 458 F. 2d 1167, 1175-1176 (2nd Cir. 1972).

9. The fact that the selection process, in part, requires subjective evaluation and that the standards of grading are not susceptible to precise definition is not sufficient to state a claim for federal relief sought herein. *Chaney* v. *State Bar of California*, 386 F. 2d 962, 964-65 (9th Cir. 1967); *Whitfield* v. *Ill. Board of Law Examiners*, 504 F. 2d 474, 476, F.N. 5, (7th Cir. 1974).

10. While it is not necessary to determine whether the type of discrimination alleged in the instant case is proscribed by federal law or regulation, it is significant that virtually all cases dealing with testing and the effect of testing on employment practices relate to racial and ethnic minorities. No such claim is presented in the instant case.

11. For the reasons stated in the Finding of Facts, it has not been shown that the Civil Service Commission has made a clear error of judgment. The decision by the Commission to assign a score of 76 points to plaintiff was based upon all relevant factors and no discrimination has been

shown. This court is not willing to attempt to regrade plaintiff's application and thereby supersede those possessing the expertise to do it and usurp the power of the Commission. Judgment must be entered for defendants.

ENTER:

J. S. PERRY,

Judge.

DATED: March 25, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MORRIS S. BROMBERG,

Plaintiff,

v.

THE CHAIRMAN, MEMBERS AND EXECUTICE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Defendants.

No. 73 C 537

JUDGMENT ORDER

This matter coming on to be heard upon complaint of Morris S. Bromberg asking the court to review a finding of the United States Civil Service Commission that plaintiff has not achieved a minimum score of 80 points on his application for Administrative Law Judge, and asking further for the court to declare its judgment that said finding was arbitrary, capricious and discriminatory, and to find that plaintiff had qualified for a minimum score of 80 points, and the court having heard the testimony of witnesses and considered every exhibit entered into evidence, and the court having heard the arguments of counsel, and the court having simultaneously herewith entered its findings of fact and conclusions of law herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff has not proved by the greater weight of the evidence that defendants discriminated against plaintiff or acted arbitrarily or capriciously.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States Civil Service Commission acted within its delegated authority and discretion in finding plaintiff unqualified for further processing as an applicant for Administrative Law Judge.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered for all defendants and against plaintiff.

ENTER:

J. S. PERRY,

Judge.

APPENDIX C

STATUTES

Title 5 U.S.C. 1302

(a) The Civil Service Commission, subject to the rules prescribed by the President under this title for the administration of the competitive service, shall prescribe regulations for, control, supervise and preserve the records of, examinations for the competitive service.

* * *

Title 5 U.S.C. 1305

For the purpose of Sections 3105, 3344, 4301(2)(E), 5362 and 7521 of this title, and the provisions of Section 5335(a)(B) of this title that relate to hearing examiners, the Civil Service Commission may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committee as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees as established for the courts of the United States.

* * *

Title 5 U.S.C. 5105

(a) The Civil Service Commission . . . shall prepare standards for placing positions in the proper classes and grades . . . In the standards, which shall be published in such form as the Commission determine, the Commission shall—

(1) Define the various classes of positions in terms of duties, responsibilities and qualification requirements;

* * *

(b) The Commission shall . . . prepare new standards, so that as nearly as may be practicable, positions existing at any given time will be covered by current published standards.

Title 5 U.S.C. 5115

The Civil Service Commission may prescribe regulations necessary for the administration of this chapter . . .

• • •

Title 42 2000e-16

Employment by Federal Government. Discriminatory practices prohibited; employees or applicants for employment subject to coverage:

(a) All personnel actions affecting employees or applicants for employment . . . in executive agencies . . . of the Federal Government . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies . . . as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit an order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an

employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

* * *

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

APPENDIX D

EXECUTIVE ORDER 11478
EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

* * *

Section 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall prog-

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ress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

* * *

Section 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

APPENDIX E

CIVIL SERVICE COMMISSION
CODE OF FEDERAL REGULATIONS

Title 5 C.F.R. Part 300

Authority: The provisions of this Part 300 issued under 5 U.S.C. secs. 3301, 3302, E.O. 10577; 3 CFR, 1954-1958 Comp. p. 218, unless otherwise noted. Secs. 300.101-200.104 also issued under 5 U.S.C. Secs. 7151, 7154; E.O. 11478; 3 CFR, 1969 Comp.

SUBPART A — EMPLOYMENT PRACTICES

300.101 Purpose

The purpose of this subpart is to establish principles to govern, as nearly as is administratively feasible and practical, the employment practices of the Federal Government generally, and of individual agencies, that affect the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion in the competitive service or in positions in the government of the District of Columbia required to be filled in the same manner that positions in the competitive service are filled. For the purpose of this subpart, the term "employment practices" includes the development and use of examinations, qualification standards, tests, and other measurement instruments.

300.102 Policy

This subpart is directed to implementation of the policy that competitive employment practices:

(a) Be practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of candidates for the jobs to be filled;

(b) Result in selection from among the best qualified candidates;

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(c) Be developed and used without discrimination because of race, color, religion, sex, national origin, partisan political affiliation, or other nonmerit grounds; and

(d) Insure to the candidate opportunity for appeal or administrative review, as appropriate.

300.103 Basic Requirements

(a) Job analysis. Each employment practice of the Federal Government generally, and of individual agencies, shall be based on a job analysis to identify;

(1) The basic duties and responsibilities;

(2) The knowledge, skills, and abilities required to perform the duties and responsibilities; and

(3) The factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics.

(b) Relevance. (1) There shall be a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed. A minimum educational requirement may not be established except as authorized under section 3308 of title 5, United States Code.

(2) In the case of an entry position the required relvance may be based on the target position when—

(i) The entry position is a training position or the first of a progressive series of established training and development positions leading to a target position at a higher level; and

(ii) New employees, within a reasonable period of time and in the great majority of cases, can expect to progress to a target position at a higher level.

(c) Equal employment opportunity. An employment practice shall not discriminate on the basis of race, color, religion, sex, national origin, partisan political affiliation, or other nonmerit factor. This requirement is generally met when an employment practice is relevant to performance in the position to be filled (or in the target position in the case of an entry position).

Title 5 C.F.R. 930.201 Coverage.

(a) This subpart applies to persons appointed under section 3105 of title 5, United States Code, for proceedings required to be conducted in accordance with sections 556 and 557 of that title, and to administrative law judge positions.

(b) Except as otherwise provided in this subpart, the rules and regulations applicable to positions in the competitive service apply to administrative law judge positions.

PLAINTIFF'S EXHIBIT 18

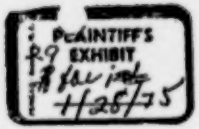
Hearing Examiner, GS-939
Name of applicant: Bremberg, Morris S.
Date of birth: 2-22-10

UNITED STATES CIVIL SERVICE COMMISSION
FACTOR RATING SHEET

27-1/2

	ITEMS (RATING FACTORS) (On basis of 0-40 points)	WITNESSES' EVALUATIONS: NO COMMENT OR NONCOMMITTAL	LESS THAN ADEQUATE	ADEQUATE	BETTER THAN ADEQUATE	OUTSTANDING	POINTS: BASIC RATING	POINTS: FINAL RATING
		PTS	-9 PTS	0-3 PTS	0-3 PTS	10-10 PTS		
GROUP I	2 Analyze and evaluate evidence				BCDEFGH TKL	AJ		
	3 Interpret and apply laws, etc.			E	ABCFGHIL	DJK	8	
	4 Write clearly and concisely	H		E	BCDFGIK	AJL		
		PTS	-6 PTS	0-3 PTS	0-7 PTS	0-12 PTS		
GROUP II	5 Secure facts under difficult conditions, through observation and interviews without friction	HI		E	ABCDFL	GJK		
	6 Handle difficult situations and make practical solutions to problems			E	BCFGHIL	ADJK	7	
	7 Preside at and control meetings, conferences or hearings with dignity and poise	EFH			ABCDIL	GJK		
		PTS	-3 PTS	0-3 PTS	0-7 PTS	0-8 PTS		
GROUP III	8 Make independent decisions	FI		E	FGH	ADGJKL	5	
	9 Be objective and free from influences affecting impartial judgment	F		EH	ABCIKL	DGJ		
		PTS	-6 PTS	0 PTS	0-3 PTS	0-4 PTS		
GROUP IV	10 Professional standing	H		EI	ABCDFGIJ KM		1	
	11 Knowledge and experience in technical subject matter field							

APPENDIX F



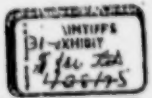
APPENDIX G

APPLICANTS FOR ADMINISTRATIVE LAW JUDGES POSITIONS

YEAR (Fiscal)	1974	1973	1972
TOTAL APPLICANTS	279	404	771
FEDERAL SOURCES	91	124	147
NON-FEDERAL SOURCES	188	280	624

APPLICANTS FOR ALJ FY 1972

TOTAL NUMBER OF APPLICANTS



TOTAL FEDERAL 147	TOTAL QUALIFIED 58	TOTAL 70 POINTS 13	TOTAL RECEIVING 70 POINTS OR MORE AS TOTAL SCORE 13	TOTAL PLACED ON REGISTER 13
		TOTAL 85 POINTS 42	42	42
		TOTAL 90 POINTS 3	3	3
	TOTAL NON-QUALIFIED 89			89
TOTAL OTHER 624	TOTAL QUALIFIED 95	TOTAL 70 POINTS 8	TOTAL RECEIVING 70 POINTS OR MORE AS TOTAL SCORE 0	TOTAL PLACED ON REGISTER 13
		TOTAL 85 POINTS 77	77	43
		TOTAL 90 POINTS 18	18	18
	TOTAL NON-QUALIFIED 529			

APPENDIX H

APPLICANTS FOR ALJ FY 1972

TOTAL NUMBER OF APPLICANTS 771

TOTAL PREFERAL 147	TOTAL OVER AGE 60 21	TOTAL QUALIFIED TOTAL NON-QUALIFIED 17
	TOTAL UNDER AGE 60 126	TOTAL QUALIFIED 54 TOTAL NON-QUALIFIED 72
TOTAL OTHER 624	TOTAL OVER AGE 60 257	TOTAL QUALIFIED 17 TOTAL NON-QUALIFIED 240
	TOTAL UNDER AGE 60 467	TOTAL QUALIFIED 78 TOTAL NON-QUALIFIED 389

APPENDIX I

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1186

MORRIS S. BROMBERG, PETITIONER

v.

ROBERT E. HAMPTON, CHAIRMAN OF THE CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On February 25, 1972, petitioner applied to the United States Civil Service Commission for appointment to the position of Hearing Examiner (now Administrative Law Judge). At the time of his application, petitioner was an Assistant Attorney General for the State of Illinois. The Commission notified petitioner, by letter dated June 12, 1972, that his qualifications did not satisfy the Commission's requirements and that his application therefore had been denied. Petitioner appealed to the Board of Appeals of the Civil Service Commission, which affirmed the decision not to appoint petitioner to the position of Hearing Examiner.

Petitioner thereupon brought suit in the United States District Court for the Northern District of Illinois, princi-

pally under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended and added, 42 U.S.C. 2000e *et seq.*,[1] alleging that in selecting Hearing Examiners the Commission unlawfully preferred attorneys with federal experience over attorneys without federal experience and discriminated against applicants over the age of 60. The district court held that Title VII did not afford a jurisdictional basis for petitioner's suit because he had not alleged that the Commission had discriminated against him on the basis of race, color, religion, sex or national origin (Pet. App. B12). The district court held, however, that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, conferred jurisdiction over the suit and the court therefore proceeded to consider the merits of petitioner's complaint. After having held a trial *de novo*, the court found that the Commission had not unlawfully discriminated against petitioner or acted arbitrarily or capriciously in denying his application (Pet. App. B13-B16). The court of appeals affirmed (Pet. App. A1-A5).

This case does not warrant further review. Title VII of the Civil Rights Act of 1964 applies only to discrimination on account of "race, color, religion, sex, or national origin." Section 717, as added, 86 Stat. 111, 42 U.S.C. (Supp. IV) 2000e-16(a). "Discrimination" against attorneys having no federal experience is not prohibited by Title VII.[2] Even if it is assumed that the district court had jurisdiction

---

[1]Petitioner also alleged jurisdiction under 28 U.S.C. 1331, 1337, 1343, 1346, 1361, 1391, and 2201, and also under 5 U.S.C. 552(a)(3) and 702.

[2]Petitioner apparently has abandoned his claim of age discrimination in this Court. In any event, the district court correctly found that petitioner had not made a *prima facie* showing that the Commission had discriminated against him on account of his age (Pet. App. B9).

under the Administrative Procedure Act,[3] the courts below were clearly correct in holding that it was not arbitrary, capricious or an abuse of discretion for the Commission to have concluded that petitioner's duties as an Assistant Attorney General of the State of Illinois had not been sufficiently diversified or complex to qualify him to perform the duties of a federal Hearing Examiner. As the district court pointed out (Pet. App. B4), petitioner's experience had consisted, for the most part, of practice before the Circuit Court of Cook County and had almost exclusively involved state revenue matters.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

---

[3]But see *Mathews* v. *Sanders*, No. 75-1443, petition for a writ of certiorari filed April 9, 1976.

[4]Petitioner incorrectly contends (Pet. 7) that this case "presents substantially the same questions of law" as *Washington* v. *Davis*, No. 74-1492, argued March 1, 1976. *Davis* involves allegations of racial discrimination. No such allegations have been made here. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424.

Neither does this case involve a *prima facie* showing of class discrimination on any other basis. See cases cited at pages 10 through 13 of the petition. As the district court noted (Pet. App. B5), petitioner failed to present valid figures showing that the Commission discriminates against any class of persons in selecting Hearing Examiners and there is thus no occasion "to decide [here] whether a valid reason exists for the discrimination, [or] to decide whether the discrimination is prohibited by a federal law or regulation."

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Supreme Court, U. S.
FILED
MAY 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1186

MORRIS S. BROMBERG,

Petitioner,

VS.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR REHEARING

MORRIS S. BROMBERG,
4300 Marine Drive,
Chicago, Illinois 60613,
Attorney Pro se,
Petitioner.

KEENAN PRINTING COMPANY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1186

MORRIS S. BROMBERG,

Petitioner,

VS.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR REHEARING

On May 3, 1976, this Honorable Court denied Petitioner's Petition for Writ of Certiorari.

This Petition for Rehearing is presented pursuant to Supreme Court Rule 58 (b). The basis for the Petition is that there exists a substantial ground for granting certiorari which was not previously specifically presented to this Court.

In the previous petition for Writ, there were three Questions Presented, none of which directly presented the paramount constitutional question, herewith presented, namely:

"Where it is shown that the U.S. Civil Service Commission has created a *de facto* classification between federal and non-federal applicants for the position of Administrative Law Judge, which classification is neither authorized by Congress nor by its own Code of Regulations, and

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the classification is not shown to have a *compelling* governmental interest, does this not constitute invidious discrimination, which violates petitioner's Equal Protection rights under the Fifth Amendment?

The precedent for petitioner's instant petition for rehearing was established in *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 83 S. Ct. 1175 (1963), where, after denying Willner's first petition for certiorari, this Court, upon the presentation of a second petition based on constitutional grounds not previously presented, not only granted certiorari, but reversed and remanded.

In *Willner*, Mr. Justice Black, speaking for the Court concluded:

> "This case whatever it started out to be, has become one in which due process requires either *de novo* consideration of petitioner's application or an orderly sorting out of the issues and an *articulated* and *constitutionally grounded* decision on the merits of petitioner's claim to admission." (emphasis added)

Willner presented a factual situation which strikingly parallels the case presented here.

Willner had passed the bar but was denied admission to practice on grounds of character and fitness. Years later, in his second petition, Willner asserted that he was excluded from the practice of law in a manner and for reasons which contravened the Due Process or Equal Protection clause of the Fourteenth Amendment.

In the instant petition, petitioner emphasizes that he was found:

> ". . . to have met the basic eligibility requirements of the type, level and recency of experience required by the Commission [in its Announcement #318][1] for

1. In its Announcement #318 for Hearing Examiner (now Adm. Law Judge), the Commission on pgs. 5 to 12, specified in detail the requirements for the position. On p. 13 the Announcement stated:

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the position of Administrative Law Judge." (District Court Finding #3, Ap. B2 and Finding #4, Ap. B3).

In his Amended Complaint, filed below, petitioner asserted that he had been denied acceptance for the position of Administrative Law Judge in a manner and for reasons which contravened the Due Process clause of the Fifth Amendment as well as his Equal Protection rights.[2]

After proofs were closed in the trial below, by leave of Court, petitioner added an amendment asserting discrimination on Title VII grounds. (Title 42 U.S.C. par. 2000e-16, et seq.).

Neither the District Court nor the 7th Circuit Court of Appeals, made *any* determination as to whether petitioner's *consitutional* rights had been violated. The District Court did find however, that it was "error" for the Commission to discriminate against petitioner because he was an assistant State Attorney General and not a *Federal attorney applicant*. (Find. #6, Ap. B4)

The District Court also found that the Commission gave an initial preferential award (rating) to the 58 federal applicants (who were found qualified) 60 points ["A" rating], while *none* of the 95 non-federal applicants (who

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"In the case of an applicant who is found to have *clearly* met the requirements of this Announcement, confidential inquiries will be sent. . . ."

The inquiries were sent.

2. While Willner's petition (supra) claimed under the Fourteenth Amendment and petitioner under the Fifth Amendment in *Buckley* v. *Valeo*, —— U.S. ——, 96 S. Ct. 612 (1975), this Court ruled:

"Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth."

In *Weinberg* v. *Weisenfeld*, —— U.S. ——, 95 S. Ct. 1225, 1228 (1975), this Court said:

"This Court's approach to Fifth Amendment Equal Protection claims has always been precisely the same as equal protection claims under the Fourteenth Amendment."

In *Douglas* v. *Hampton*, 512 F. 2d 976, 981 (D.C. Cir. 1975), the Court ruled:

"No court has distinguished the standard mandated by the Fifth and Fourteenth Amendments from that specified by Title VII. . . . The *Griggs* standard is the measure and rights of the parties."

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were found qualified) received an initial rating of 60 points.[3]

The District Court, without passing on the constitutional question presented, simply ruled that Title VII did not apply to the "Type of discrimination" alleged.

It is to be observed that Respondent's Memorandum, filed in opposition to Petitioner's petition for Writ, echoed the Trial Court's decision that "Title VII . . . applies only to discrimination on account of 'race, color, religion, sex, or national origin." (Resp. Memo. p. 2).

In Respondent's Memorandum, it is asserted, without supporting judicial authority, that:

> "Discrimination [by the commission] against attorneys having no federal experience is not prohibited by Title VII." (Resp. Memo. p. 2).

This may prove to be true. The fact is however, that this Court has never prescribed the parameters of Title VII and to the best of our knowledge neither has any Federal Court.

While contending that the admitted discrimination against non-federal attorney applicants is not prohibited by Title VII, the Commission patently overlooks the fact there is nothing contained in its Announcement #318, limiting eligibility for the position to Federal attorney applicants. On the contrary, the Announcement, on p. 5, provides that qualifying experience for eligibility may also be obtained by a lawyer with trial experience in courts of original and unlimited jurisdiction.

By the above statement in the Memorandum, the Commission has once again conceded that it does discriminate against attorneys without federal experience.

It appears to be likewise established that the present discriminatory policy of the Commission is a perpetuation

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3. As shown on page 9, non-federal applicants are *"presumed* by the Commission to acquire" a "C" rating (55 points).

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of the effects of the discriminatory policy that prevailed prior to 1970. Prior to July 1970, applicant eligibility was limited to those with 2 years of Administrative law experience. This resulted in chilling and virtually eliminating hundreds, if not thousands, of prospective applicants, who did not possess administrative law experience. Since 1970:

> "Qualifying experience may be obtained . . . by preparing and trying (or hearing) cases in Courts of original and unlimited jurisdiction.
>
> "The latter standard was adopted by the Commission in July 1970, after considering a recommendation made by the Administrative Conference of the United States."[4]

Before we delve into the constitutional issues here involved, we beg the indulgence of this Court to briefly discuss an issue presented in the Respondent's Memorandum (at p. 4) that:

> "Petitioner *incorrectly* contends (pet. 7) that this case 'presents substantially the same questions of law' as *Washington* v. *Davis*. . . . *Davis* involves allegations of racial discrimination. No such allegations have been made here. See *Griggs*. . . ."

Griggs hardly provides judicial support for the Commission. While *Griggs* did involve racial discrimination, nevertheless the Court there ruled:

> "*Discriminatory preferences* for *any group* . . . is *precisely* and *only* what Congress has proscribed. What is required by Congress is the removal of artificial, *arbitrary* and unnecessary barriers to employment when the barriers operate invidiously, to discriminate

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4. Excerpted from an article by *Charles Dullea*, Director of the Office of Administrative Law Judges of the Commission, reported in *Administrative Law Review*, Vol. 25, p. 45 (Winter 1973 issue).
While not strictly relevant, petitioner, to indicate the capriciousness of the Commission in this case, observes that, as shown in his original application, he has handled well over 100 cases of Administrative Law Review as Assistant Attorney General in addition to a broad and successful trial and appellate experience, in the state *and* federal courts.

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> on the basis of racial or *other* impermissible *classification*. . . ." (Emphasis added.)

In the recent case of *Franks* v. *Bowman*, No. 74-728, 44 LW 4356, Mr. Justice Brennan for the majority cogently observed that the *underlying* legal *wrong* affecting the applicant, was not the alleged operation of racially discriminatory *seniority* system, but of a *discriminatory hiring system.*

Respondents mistake petitioner's reference to the similarity of issues in his case and in *Davis.* All that the petition contends is that both cases turn on whether proof of disproportionate pass-fail statistics *alone* establish a *prima facie* case of discrimination and shifts the burden to the prospective employer to justify the discrimination.

If this Court affirms *Davis* on this issue, then petitioner is entitled to the benefit of that ruling. The case at bar, however, goes far beyond the issue of pass-fail statistics which indicate only *prima facie* a *presumption* of discrimination. In the instant case, the discrimination is *established* by the Trial Court's Findings (Ap. B4 and B5) as well as by the Commission's *admissions.* The pass-fail statistical evidence is simply cumulative.

By the consistent rulings of this Court, beginning with *Griggs,* once the fact of discrimination is established, the burden shifts to the employer to show that the employment practice is job-related. More recently, this Court in *Albemarle* v. *Moody,* ——U.S.——, 95 S. Ct. 2362, reaffirmed *Griggs* thusly:

> "If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."

In the case at bar, it is not contended by the Commission that it made any attempt to show the job-relatedness to its admitted employment practice of discriminating against non-federal applicants.

While the law may be unsettled as it relates to the parameters of Title VII proscribed employment practices, the law *is* well settled as to the constitutional prohibitions against practices which violate Equal Protection rights. This Court has repeatedly ruled that invidious discrimination is violative of the Constitution. A few examples will serve to illustrate that point.

In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373, 374 (1886), this Court ruled that a purposeful and intentional discrimination between persons or classes violated the Equal Protection of the Law.

In *Royster Guano* v. *Virginia*, 252 U.S. 412 (1920), which involved an issue of Equal Protection of the Laws, this Court laid down the basic rules applicable to *classification*: . .

> ". . . the classification must be reasonable, not arbitrary and must rely upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. . . ."

In the recent case of *Shapiro* v. *Thompson*, 394 U.S. 618, 69 S. Ct. 1322, a statute prohibited welfare benefits to residents of less than one year in the State. This Court affirmed the three-judge District Court, which ruled the statute invalid as denying the equal protection secured by the Fifth Amendment, because it *created* an invidious and irrational *classification*. This Court noted that the Appellees met the test for residence as well as all other eligibility[5] requirements except for the lack of one year's residence.

The Court ruled that the interests sought to be promoted by the attempted classification "either may not constitutionally be promoted or are not *compelling* governmental interests."

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5. It has been previously noted (p. 2) in this petition that petitioner met the "eligibility requirements" of the Commission.

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In *Levy* v. *Louisiana*, 391 U.S. 68, 88 S. Ct. 1509 (1968), an action was brought on behalf of illegitimate children for the wrongful death of their mother. This Court reversed the ruling of the Court below, which held that a "child" under the statute meant a "legitimate child", holding that while a State has broad discretion to make classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. ". . . the end result is whether the line drawn is a *rational* one."

In *Butts* v. *Nichols*, 381 F. Supp. 573 (U.S. D.C. S.D. Iowa 1974), a three-judge court ruled that a state statute prohibiting employment of convicted felons in civil service positions, violates the Equal Protection clause of the Fourteenth Amendment. The Court ruled that "The State must *also* show a *compelling* State reason [a rational basis] which could avoid the adverse effect of the statutes. . . ."

In *Turner* v. *Department of Employment*, ——U.S.——, 96 S. Ct. 249 (1975), this Court, in consonance with its previous decisions, ruled unconstitutional a challenged provision which sought to establish a blanket disqualification during an 18 week period immediately preceding and following childbirth, which rested on a "conclusive presumption" that women are unable to work during that period.

The Commission recognized the validity of the "rational basis theory" in its Code of Federal Regulation (5 C.F.R. par. 300.103(b), Ap. E2):

> "There shall be a *rational* relationship between performance in the position to be filled . . . and the employment practice used. The demonstration of *rational relationship* shall include a showing that the employment practice was professionally developed."

This then is the Code. What of the practice? In a pleading filed by the Commission below this was the "rational relationship" shown:

> "Although page 4 of the Commission's Rating Schedule does indicate a Federal agency attorney (G. S 15 status) *will* be assigned an "A" rating (60 points) . . . and indicates a State agency attorney is *presumed* to acquire a "C" rating (55 points) . . . that differentiation has a rationale [sic] basis: the position being applied for is a Hearing Examiner (Adm. Law Judge) for federal administrative work." (Emphasis added.)

Assuredly, it requires no citation of authority that the "conclusive presumption" made by the Commission offends the equal protection rights of non-federal applicants of which class petitioner is a member, absent empirical test evidence.

In our initial petition we presented the question as to whether the Commission is bound by law to follow its own regulations. Stated otherwise, "no man is above the law." Not even the President of the United States. *United States* v. *Nixon,* 418 U.S. 683, 94 S. Ct. 3090 (1974). Can it be seriously urged that the Commission, which is the chosen guardian of Civil Service, is above the law and is not obliged to follow the rules which *it* has laid down for *all* federal agencies?

The House Report, accompanying P.L. 92-261, the Equal Employment Opportunity Act of 1972, stated the position of petitioner succinctly:

> "The Federal service is an area where equal employment opportunity is of paramount significance. Americans rely upon the maxim 'government of the people' and traditionally measure the quality of their democracy by the opportunity they have to participate in governmental process. It is therefore imperative that equal opportunity be the touchstone of the Federal system." (1972 Vol. U.S. Cong. and Adm. News, page 2137).

The Commission which demands from private employers an adherence to Equal Opportunity in employment, the Commission which proudly describes itself as an "Equal Opportunity Employer" must not only follow its own regulations, it must show the way by its own example.

CERTIFICATE OF COUNSEL

MORRIS S. BROMBERG, attorney pro-se for Petitioner in the above Petition for Rehearing, hereby certifies that he is an attorney at law, duly admitted to practice before the United States Supreme Court. He further certifies that the Petition, in his opinion, presents a meritorious basis for Rehearing; that it is filed in good faith and is not for the purpose of delay.

Respectfully submitted,

/s/ _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1186

MORRIS S. BROMBERG,

Petitioner,

VS.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR REHEARING

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SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR REHEARING

Petitioner, Morris S. Bromberg [Bromberg], files this Supplemental Brief in support of his pending Petition for Rehearing, pursuant to Supreme Court Rule 24 (5), in light of *Washington* v. *Davis*. #74-1492, decided June 7, 1976.

In the flurry of Civil Rights actions that followed *Griggs* v. *Duke Power Co.*, 401 U.S. 424, a number of conflicts arose between the various Circuits, which Washington has clarified.

This Court has now Held:

(1) A claim of unlawful discrimination will lie where there is a *claim* and a *prima facie* showing of "intentional discrimination"; and

(2) A finding by the trial Court, that there is a disproportionate failure by one group to qualify for employment over that of another group coupled with the fact that the

test or the employment practice has not been previously validated, is "sufficient" to meet the *prima facie* requirement and the burden then shifts to the defendants to show a "job relationship."

In his Amended Complaint, filed below, petitioner herein sought, *inter alia*, a declaration that the United States Civil Service Commission violated his Equal Protection rights under the Fifth Amendment, and invidiously discriminated against him because he was a *non*-federal applicant for the position of Administrative Law Judge rather than a *federal* applicant.

Thereafter, petitioner added an amendment claiming, *in addition*, a violation of his rights under Title VII, as amended in 1972.

The District Court *ignored* the *main* thrust of petitioner's complaint, namely, the violation of his rights to Due Process and Equal Protection under the Fifth Amendment, and rejected petitioner's prayer for relief for the reason that:

> "The Complaint, as Amended, does not allege any discrimination . . . because of race, color, religion, sex or national origin. . . . Consequently, Title VII . . . is *not applicable* to the instant case."
> (Ap. B. 12).[1] (Emphasis Added)

In *Washington*, the District Court determined that a higher percentage of blacks failed the test than did whites and that the test had not been previously validated. This showing was deemed *sufficient* to shift the burden of proof to the defendants. Thereafter, the District Court concluded, based on validation studies (note 17 of Supreme Court opinion) as well as by other evidence of record, that the Defendants had met their burden, and since there was no claim of "intentional discrimination", ruled that plaintiffs were not entitled to relief.

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1. Ap. B. 12 refers to the Appendix and page number in Petitioner's original Petition for Writ.

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Upon appeal, the Court of Appeals reversed the judgment of the District Court, upon an application of what it considered to be the legal standards applicable to Title VII cases,[2] and declared:

> "... that *lack* of discriminatory *intent* in designing *and* administering Test 21 was *irrelevant*."
> (emphasis added).

Thereafter, this Court granted the petition for Certiorari and after argument ruled:

> "Because the Court of Appeals *erroneously* applied the legal standards applicable to Title VII cases in resolving the *constitutional* issue before it, we reverse its judgment in respondent's favor."
> (emphasis added.

Since this Court ruled that it was error for the Court of Appeals in *Washington* to apply Title VII standards in resolving the *constitutional issue* before it, *a fortiori* it was "erroneous" for the District Court in *Bromberg*, to completely ignore the constitutional claim and to address itself solely to the Title VII issue, which was petitioner's secondary theory.

In reversing the Court of Appeals, this Court laid down the rule that where a claim of discrimination is made upon a constitutional basis, namely the Due Process clause of the Fifth Amendment, "a purpose to discriminate must be present" and where an infringement of constitutional rights of petitioners is involved, the facts in the case must warrant the conclusion that there was used "a purposeful device to discriminate" as "between *individuals* and *groups*."

Applying this rule in *Bromberg*, not only did the District Court err in failing to *resolve* the *constitutional* issue, it likewise failed to apply the legal standards re-

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2. Plaintiffs in *Washington* did not allege a violation of Title VII (see n. 6 of opinion)

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quired by the Due Process clause of the Fifth Amendment which:

> ". . . contains an equal protection component prohibiting the United States from invidiously discriminating between *individuals* and *groups*." (*Bolling* v. *Sharpe*, 347 U.S. 497, quoted with approval by this Court.)

particularly where it is shown that:

> ". . . a *purpose* to discriminate . . . [is] present . . . proven by . . . an unequal application of the law to such an extent as to show *intentional discrimination*." (Quoted with approval by this Court from *Akins* v. *Texas*, 325 U.S. 398, 403, 404).

That there is "intentional discrimination" in the case at bar is beyond dispute.

In its Finding #6 (Ap. B4) the District Court ruled that it was "error" for the Commission to discriminate against petitioner because he was an Assistant State Attorney General [*non*-federal applicant] rather than a *federal* applicant. In another finding (# 7, Ap. B5) the Court determined that the Commission gave an initial *higher* rating to federal applicants than to non-federal applicants and found, based on the statistics prepared by the Commission, that while only 95 (15.2%) out of 624 non-federal applicants were accepted, 58 (39.4%) of the 147 federal applicants qualified, a disparity ratio of 2½ times.

If any doubt existed as to the Commission's "intentional discrimination" against non-federal applicants, that doubt was resolved by the Commission's *admission* of discrimination, contained in a pleading filed by it below. (See top of p. 9 of Petition for Rehearing).

In its decision in *Washington*, this Court *agreed* with the District Court that the differential effect of Test 21, namely that a higher percentage of blacks failed the test than whites, *called for further inquiry*. As noted by this Court (note #15) the "federal parties" (the Commission) argued that:

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> ". . . in *Griggs* . . . the Supreme Court set a 'job relationship standard' . . . which has been a standard for federal employment since the passage of the Civil Service Act of 1883. In that Act, Congress has mandated that the federal government must use . . . examinations for testing applicants for appointment . . . which as far as possible relate to matters that fairly test . . . applicants for the appointments sought."[3]

In passing, it is appropriate to note that the Commission adopted the above language almost verbatim in its Code of Federal Regulations (Title 5 C.F.R. Part 300, et seq.). In fact, the Commission established a definitive standard requiring that:

> "There shall be a *rational relationship* between performance in the position to be filled and the employment practice used . . . which shall include a *showing* that the employment practice was *professionally* developed." (Title 5 C.F.R. 6300.103(b)(1) (Ap. E2)[3]

Thus, since there is here shown an undisputed "intentional discrimination" which by the standard set by this Court, shifted the burden to the Commission to show a "job-relationship", a burden which the Commission *wholly* failed to assume, it is now manifest that the District Court, in the case at bar, erred when it ruled, in the face of its own findings of discrimination and in the face of the admitted *intentional discrimination* by the Commission that:

> ". . . it is not necessary to decide whether a valid reason *exists* for the *discrimination*, nor to decide whether the *discrimination* is prohibited by Federal law or regulation." (Finding #7, Ap. B5). (Emphasis added.)

In view of the conflict between the District Court's ruling in the instant case and the rulings of this Court in *Washington*, there can be no doubt that the views of the highest Court in the land must prevail.

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3. Had the Commission followed its own argument and its own regulations in the case at bar, there would be no case at bar.

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Since the District Court in *Bromberg* predicated his ruling on the fact that there was no claim of discrimination on racial grounds, it is relevant to note that in his concurring opinion, Mr. Justice Stevens observed that if there is intentional discrimination in violation of the Constitution it is immaterial whether it is a "racial discrimination." As an example he referred to a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. (Referring to *Yick Wo* v. *Hopkins*, 118 U.S. 356, where the Supreme Court ruled in 1886, that a purposeful and intentional discrimination between individuals and groups violated Equal Protection rights. Other cases not involving racial discrimination where relief was granted are shown on p. 7 of Petition for Rehearing.

Accordingly, it is respectfully submitted, that consistency on the part of this Honorable Court would appear to require the issuance of a Writ of Certiorari in the instant case, to permit consideration of the important federal issue involved, or that in the alternative, that this Court summarily reverse the order of the District Court and remand with instructions to reconsider in light of *Washington* v. *Davis*.

Respectfully submitted,

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